The Board of Assessors of the City of Detroit, one of the petitioners herein, refused to honor respondent's claim of immunity, and assessed such imported coils of steel in full. Respondent duly appealed such assessment to the City of Detroit Board of Review which ruled that such imported steel was entitled to immunity under the United States Constitution and reduced the assessment accordingly.

The petitioners appealed the Board of Review's determination to the Michigan State Tax Commission. After auditing respondent's records in detail, petitioners conceded that the respondent was the "importer" of the Japanese steel (acquired by respondent in essentially the same fashion as the European steel) but still insisted that 50% of it was subject to tax (for the reason that the petitioners considered respondent to be a "manufacturer" and 50% of said steel was deemed to be required for respondent's current operational needs).

On February 3, 1967, the Michigan State Tax Commission held that (i) the entire Japanese steel was immune from taxation, and (ii) the entire European steel was subject to taxation (Appendix B).

The respondent duly appealed said decision of the Michigan State Tax Commission (with respect to the taxation of the European steel) to the Michigan Court of Appeals, and its case was consolidated with the ten other respondents involved herein. (The petitioners did not appeal the decision granting full immunity to the Japanese steel.) On December 2, 1968, the Michigan Court of Appeals vacated the order of the Michigan State Tax Commission and held said imported steel to be immune from personal property taxation.

The petitioners and the Michigan State Tax Commission filed an application for leave to appeal the aforesaid decision to the Michigan Supreme Court, which court denied

their request for the stated reason that the petitioners "failed to persuade the Court that they have a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous." (See Appendix A.)

(b) Substantive Facts

All of the respondent's purchase orders for the European steel were placed with Nimpex International, Inc., a steel brokerage company with offices in New York, which acted in an agency relationship concerning the transactions in question. Nimpex was not the owner of any of the steel at the time respondent placed its orders. Only *after* it received an order from respondent did Nimpex place its orders with the European mills in fulfillment of the special order of respondent. Although respondent was familiar with the European mills which produced said steel, its personnel having visited and inspected the mills involved, neither respondent nor any other United States company could purchase directly from such mills because the mills would sell to the United States companies only through Nimpex. However, mill testing certificates, packing certificates, and markings on the coils all clearly indicated (*prior* to the steel being placed aboard the ship in the foreign port) that the steel in question was specifically destined for respondent in Detroit, Michigan.

The records in this case unequivocally show the time sequence of pertinent events concerning a transaction with Nimpex to be: *first,* a purchase order by respondent ordering specific gauges and widths of steel coils, and *second,* fulfillment of the order by the European mill as evidenced by packing certificates indicating certain markings on the coils to identify the steel destined for respondent. *In no instance did respondent purchase steel through Nimpex after the steel left the European port.*

ARGUMENT

(a) The Court Does not Have Jurisdiction to Entertain the Petition.

As stated above, and as acknowledged by petitioners in their "Supplemental Petition" filed with this Court, the petition for writ of certiorari was filed more than 90 days after the judgment of the Michigan Supreme Court.

That a petition for a writ of certiorari must be filed within 90 days after entry of judgment (unless the time be extended by a Justice of this court for a period not to exceed 60 days) is not open to question, 28 U.S.C. §2101(c). If a petition is untimely, the court does not have jurisdiction to entertain it, irrespective of whether the record may show a proper case for its allowance. *Rust Land & Lumber Co. v. Jackson,* 250 U.S. 71, 39 S. Ct. 424, 63 L.Ed. 850 (1919).

(b) There Are No Special and Important Reasons to Grant the Petition

In the event the court should decide it has jurisdiction to entertain the petition, such petition should not be granted since there are no special and important reasons therefor.

As noted above, the Michigan Supreme Court, the highest court in the state, did not consider that petitioners had a meritorious basis for appeal of the decision of the Michigan Court of Appeals. The argument made by petitioners concerning the pending litigation in the lower courts of the state did not impress that court, nor should it have any impression on this court. Although, as pointed out by petitioners, an ever-increasing volume of foreign goods claimed immune are arriving in ports on the Great Lakes, the volume of pending litigation is only within the City of

Detroit and does not involve other taxing jurisdictions within the State of Michigan or elsewhere.

It is significant that the Michigan State Tax Commission, which is the state administrative body charged with the duty of supervising the administration of property tax laws of the State and which was a party in this case in the Michigan Court of Appeals and appellant in the Michigan Supreme Court, did not join in the petition filed herein. Therefore, one must assume that said Michigan State Tax Commission does not view this matter as having the same importance as do the petitioners, even though the Commission is involved with all taxing jurisdictions in the State, and not just the City of Detroit. Moreover, it would seem to be a fair assumption that the Attorney General of the State of Michigan, who represents the Michigan State Tax Commission, considers that the issues were properly resolved against the petitioners by the Michigan Court of Appeals and the Michigan Supreme Court.

(c) The Decision Below is in Accord With Applicable Decisions of This Court.

The decision of the Michigan Court of Appeals straightforwardly and correctly applied the principles of *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 65 S. Ct. 870, 89 L.Ed. 1252 (1945), to the facts involved herein.

The plain meaning of the *Hooven & Allison* case is that the "importer" in the constitutional sense is the party who is the efficient cause of the importation. As stated by this court (324 U.S. at 662-663):

> "For the purpose of determining whether petitioner was the importer in the constitutional sense, it is immaterial whether the title to the merchandise imported vested in him who caused it to be brought to this country at the time of shipment or only after

> its arrival here. . . . For in determining the meaning and application of the constitutional provision, we are concerned with matters of substance not of form. When the merchandise is brought from another country to this, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected. . . ."

The fact that *Hooven & Allison* involved a manufacturer rather than a wholesaler; as in the case of respondent, is a distinction without a difference and certainly is not a basis for distinguishing that case as the petitioners would have us believe.

Whereas the petitioners stress the minor and irrelevant distinctions between our case and *Hooven & Allison,* as a matter of fact, found to be so by the Court of Appeals, the factual similarities between the cases make them, for all practical purposes, indistinguishable.

Comparing the salient facts in *Hooven & Allison* to our present case, we find that both the Hooven & Allison Company and respondent contract for their requirements of the property *before* its shipment to this country, and sometimes even *before* the property is produced in the foreign country; both companies negotiate for the purchase of the property with brokers located in the United States; the purchase price paid by both companies includes charges for ocean freight, insurance, and customs; both companies made payment to the broker, not to the foreign producer; in both cases the broker clears the property through customs; in both cases the goods are specifically marked when they leave the foreign port to identify them as being destined for the taxpayer-purchaser; in both cases there is no retention of a security title by the foreign seller, the broker,

or any intervening banker, to secure payment by the taxpayer-purchaser of the purchase price; in both cases the purpose and necessary consequence of the importation are to supply the taxpayer-purchaser with the merchandise; in both cases the risk of loss from change in market value is on the taxpayer-purchaser; *in both cases but for the taxpayer-purchaser's contracts of purchase, the merchandise would not have been brought into the United States;* in both cases the performance of the taxpayer-purchaser's contracts of purchase call for, and necessarily result in, importation; thus, in both cases the taxpayer-purchaser's contracts of purchase are the inducing and efficient cause of importing the merchandise into the United States.

It must be reiterated that *in no instance did respondent claim any steel to be immune which it purchased after said steel left the foreign country,* and the record in our case clearly establishes this to be the fact.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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July 18, 1969.

CONCURRENCE IN BRIEF BY RESPONDENT CRAFT STEEL & SUPPLY COMPANY, INC.

Craft Steel & Supply Company, Inc. a respondent herein, concurs in the Brief of Barsteel Corporation in that its position herein is substantially similar to that of Barsteel Corporation.

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CONCURRENCE IN BRIEF BY RESPONDENT KENWAL PRODUCTS CORPORATION

Kenwal Products Corporation, being the appellant in case number 3323 before the Michigan Court of Appeals joins with Barsteel Corporation in the filing of this Brief.

The factual record below in the case of respondent, Kenwal Products Corporation consists solely of written exhibits. The principal exhibit is the City of Detroit's own exhibit, designated Exhibit A. Respondent Kenwal Products Corporation has two exhibits, namely, Exhibits No. 1 and 2, the former being a letter of Nichimen Co., Inc., 60 Broad Street, New York, New York, and the latter a letter of The Donovan Wire & Iron Co., of Toledo, Ohio, respectively, as to the existence of joint ventures. There are four separate transactions in the Kenwal case, which for the

sake of reference are referred to as Okaya, Zack, Donovan and Nimpex.

The City, in its exhibit A conceded that Kenwal was the importer in the Okaya transaction. On the first page of the City's Exhibit A, the heading states: "Kenwal Products Corp.—Imported Steel—Considered Original Importer."

The underlying facts were the same in the Zack transaction and Donovan transaction as in the Okaya transaction. The only formal difference was that the paperwork appeared in the names of Zack and Donovan. However, Kenwal, by its Exhibits No. 1 and 2 established joint ventures in these two cases. The validity of these joint ventures is expressly ruled on by the Michigan Court of Appeals in its opinion in 165 N. W. 2d. 875 (1968), a copy of which is filed as Appendix A to the Petition For Certiorari, and said joint ventures are not here contested by the petitioners. In view of the concession by the petitioners in the Okaya transaction and the establishment of the joint ventures in the Zack and Donovan transactions, there is no issue of any nature for petitioners to raise as to the said Okaya, Zack and Donovan transactions.

As to the fourth transaction, the so-called Nimpex transaction, which, in the Kenwal case is confined to European steel, this respondent's position is identical with that of Barsteel Corporation with whom this respondent is joining in the filing of this brief.

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APPENDIX A

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 20th day of March in the year of our Lord one thousand nine hundred and sixty-nine.

Present the Honorable Thomas E. Brennan, Chief Justice, John R. Dethmers, Harry F. Kelly, Eugene F. Black, Thomas M. Kavanagh, Paul L. Adams, Thomas G. Kavanagh, Associate Justices.

On order of the Court (T. G. Kavanagh, J., not participating), the application for leave to appeal is considered, and the same is hereby DENIED, as plaintiffs and appellants have failed to persuade the Court that they have a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous. Plaintiffs' and appellants' request for a stay of proceedings is DENIED, as thereby being moot.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 20th day of March in the year of our Lord one thousand nine Hundred and sixty-nine.

Harold Hoag,
Deputy Clerk.

APPENDIX B

STATE OF MICHIGAN

BEFORE THE MICHIGAN STATE TAX COMMISSION

At a meeting of the Michigan State Tax Commission held on the 26th day of January, 1967 at Lansing, Michigan

IN RE PETITION NO. 15-1365 of the Detroit Board of Assessors, City of Detroit, County of Wayne, State of Michigan, received on June 30, 1966, requesting to place upon the assessment roll property omitted therefrom, consisting of personal property in the form of steel inventory, belonging to Barsteel Corporation, 13710 Mt. Elliott, Detroit, Michigan.

The petitioner, the Detroit Board of Assessors, contends that personal property was erroneously omitted from the assessment rolls and the same should be placed upon the rolls in accordance with the provisions of Sec. 211.152-C. L. of Mich. 1948.

The Commission accepted the petition for examination and caused an investigation to be made to determine the assessable value of the personal property and to determine to whom the property should be assessed. A hearing was held on November 22, 1966 at Detroit, Michigan, at which hearing the taxpayer of the property in question was represented by counsel.

After consideration of the data presented at the hearing and the examination and investigation of the Commission's staff along with other written documents and exhibits of the taxpayer and the Detroit Board of Assessors the Commission finds:

1. The Detroit Board of Assessors in Petition No. 15-1365 asks the current assessment of $623,440 to be raised to $1,004,380 because of additional value revealed in an audit by a member of the Board of Assessors staff. However, this original request for revision was amended so that the raise asked for by the Detroit Board of Assessors was $961,680.

2. The investigation revealed that the issue involved in this dispute is not one of valuation but is a legal issue concerning the assessability of certain imported steel inventories. The city of Detroit claims that the steel in question has been purchased by the taxpayer from an importer and thereby has entered the channels of trade and become subject to ad valorem taxation. The city pointed out that it was determined in the audit that inventory costing $267,101 could be sustained by the documents as being imported by the taxpayer. The city further claims that since the taxpayer processed most of its materials for resale it was estimated at 50% or $133,550 of this inventory was for current operational needs and included in the requested assessment raise. The taxpayer on the other hand claims that they are the "importer" and as such the steel in question retains its immunity from ad valorem taxation as an "imported product" under Article I, Section 10, Chapter (sic) 2 of the United States Constitution which reads:

> "No State shall, without the consent of the Congress, lay any imports (sic) or duties on Imports or Exports . . ."

3. Taxable property, both real and personal in the city of Detroit are assessed at a significant range of from 41% to 56% of their true cash value, or a properly weighted mathematical average for the local unit of 45.25% which is sustained by an equalization study made by the Commission in 1963, which data has been kept routinely current

by the Commission and checked in the field by the Commission's staff.

4. That where property was omitted from the assessment roll erroneously it should be placed upon the assessment roll as provided in Sec. 211.152 C. L. of Mich. 1948.

After these findings of facts and the consideration of all the information contained therein the Commission still has reservations. On the basis of the documents, exhibits, etc., there are doubts as to whether or not the goods in question are "imports" under Article I, Section 10, Chapter (sic) 2 of the United States Constitution. Taxation is the rule and there is a presumption that property is taxable unless it clearly appears that constitutional provisions or statutes grant an immunity from taxation. The burden of proof to establish immunity from ad valorem taxation rests on the taxpayer. The Commission is of the opinion that the taxpayer has failed to prove its claim of immunity from taxation based on the theory of imported goods, except in the case of the $367,101 which the city of Detroit readily admits as being imported by the taxpayer. Therefore, the petition of the Board of Assessors of the city of Detroit is granted with reservations as to the final assessed valuation. These reservations are based upon the utilization of the correct assessment ratio to apply to true cash value in order to achieve the correct assessed valuation, along with the granting of immunity from taxation for the full amount of the inventory imported by the taxpayer. It is determined in the opinion of the Commission that the undisputed true cash value of the property involved is $1,789,810 and the assessment level is 45.25% of true cash value. Therefore, appellant's assessment should be $809,900. Since the proposed assessment per Petition No. 15-1365 is $1,004,380 it is clearly apparent that the proposed assessment is significantly above and is not in accordance

to the true cash value reduced to the local assessment level and the true cash value of all other real and personal property within the city of Detroit, reduced to such assessment level. The Commission fully appreciates the fact that the question presented in the petition is of a legal nature. We readily acknowledge that the courts are best adapted to resolving the legal questions involved just as the Commission believes itself to be the most proficient in questions of valuations. Should the taxpayer be dissatisfied and seek further relief available under the law, the Commission directs his attention to Sec. 211.53 of the C. L. of Mich. 1948, or in an action for a declaration of rights.

WHEREFORE, it is hereby ordered that the amount of $809,900 be placed upon the assessment roll as the true and lawful value of such property.

Robert L. Purnell, Chairman
R. Gerald Barr, Commissioner
Ward G. Dexel, Commissioner

I hereby certify that this is a true copy of the order of the State Tax Commission on file in the State Tax Commission office as provided by Act 147, P.A. 1960.

Edward W. Kane,
Secretary.

February 3, 1967